

*For Publication*

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

<b>ELIZABETH SIMMONDS,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>CIVIL NO. 617/1998</b>
	)	
<b>v.</b>	)	<b>Action for Medical</b>
	)	<b>Malpractice and</b>
	)	<b>Damages</b>
<b>GOVERNMENT OF THE VIRGIN ISLANDS, and</b>	)	
<b>DR. AMADOR MARTINEZ,</b>	)	
	)	
<b>Defendants</b>	)	
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**MEMORANDUM OPINION**  
**(Filed March 12, 2002)**

**Ross, J.**

**THIS MATTER** is before the Court on Defendant Government of the Virgin Islands's ("Government") motion for summary judgment for Plaintiff's failure to comply with the pre-filing procedures of the Virgin Islands Tort Claims Act ("VITCA") based on a claim alleging medical malpractice against the Government. For the following reasons, the Court will grant Defendant's motion.

The Court may grant summary judgment pursuant to Fed. R. Civ. P. 56(c) only when the record shows that there is no genuine issue of material fact, and as such, the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A material fact is one that will affect the outcome of the suit under applicable law, and a dispute over a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson* at 247-48. In deciding whether there is a disputed issue of material fact, the court must resolve all doubts in favor of the non-moving party. *Desvi, Inc. v. Continental Ins. Co.*, 968 F2d 307 (3<sup>rd</sup> Cir. 1992).

On April 28, 1995, Plaintiff presented herself to the Juan F. Luis Hospital ("hospital") complaining of body aches and pain and was treated in the emergency room by Defendant Amador Martinez ("Martinez"), a doctor employed at the hospital. Defendant Martinez determined that Plaintiff was suffering from a vaginal infection and prescribed medication. Plaintiff contends that Defendant Martinez, while instructing her on how to apply the medication, touched her in a sexually inappropriate manner. It is from this treatment that Plaintiff bases her allegations. Plaintiff alleges that Defendant Martinez failed to properly diagnose Plaintiff's condition, failed to properly treat Plaintiff's condition, and failed to use proper procedures in the treatment of Plaintiff's condition, and as a result, Defendant Martinez's actions were below the recognized standard of care. Additionally, Plaintiff asserts that her cause of action accrued on October 15, 1997 when she received a medical expert report stating that her injury was caused by medical malpractice. Thus, Plaintiff filed her notice of intent on November 1, 1997 and filed her complaint on July 12, 1998. Defendant Government contends that Plaintiff did not comply

with the pre-filing procedures of VITCA, specifically the 90-day notice of intent because her claim accrued on April 28, 1995 when she was treated at the hospital, and not when she received a medical expert report almost two and a half years later.

Whenever a claimant brings a claim for medical malpractice against the Government, pursuant to 27 V.I.C. § 166i, he or she must first comply with the jurisdictional pre-filing procedures of VITCA, 33 V.I.C. § 3409 *et seq.* See *Kathleen Samuel v. Government of the Virgin Islands, et al*, Civ. No. 349/1999 (Terr. Ct.-STX). Once a claimant has complied with VITCA, he or she must then comply with the jurisdictional pre-filing procedures of the Health Care Provider Malpractice Act. See *Saludes v. Ramos*, 744 F.2d 992 (3<sup>rd</sup> Cir. 1984); See also *Walters v. Government of the Virgin Islands*, 30 V.I. 36 (Terr. Ct. 1994). These jurisdictional pre-filing procedures must be strictly adhered to before an action for medical malpractice may commence. See *Quinones v. Charles Harwood Memorial Hospital*, 573 F.Supp. 1101 (DCVI 1983); See also *V.I. Telephone Corp. v. Government of the Virgin Islands*, 13 V.I. 405 (DVI 1977). Accordingly, in considering whether a claimant has complied with the jurisdictional procedures, it is imperative that the court determines an accrual date for purposes of compliance with the stringent 90-day notice provision.

It is well settled that the discovery rule applies to tort claims, including claims for medical malpractice. See *United States v. Kubrick*, 444 U.S. 111 (1979). See also *Daniels v. Government of the Virgin Islands*, 30 V.I. 34 (Terr. Ct. 1994). To that end, a claim accrues when the Plaintiff knows both the existence and cause of his or her injury, and not at a later time when he or she also knows that the acts inflicting the injury may constitute medical malpractice. A review of the record indicates that the alleged improper touching, which serve as the basis for her claim for incorrect diagnosis and treatment, occurred on April 28, 1995. Thus, Plaintiff was aware that when Defendant Martinez allegedly touched her in a sexually inappropriate manner, it was wrong. Plaintiff did not need a medical expert to tell her that when a doctor inappropriately touches you in a manner inconsistent with the purpose of treatment it is wrong. Accordingly, Plaintiff knew or should have known that she had an injury and its cause on April 28, 1995.

Thus, Plaintiff's filing of the notice of intent on November 1, 1997 is outside the 90-day notice period and precludes the Court from exercising subject matter jurisdiction.

Therefore, the premises considered, and the Court otherwise being duly advised it is hereby

**ORDERED** that Defendant Government's motion is **GRANTED**.

Dated: March 12, 2002

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Edgar D. Ross  
Judge

ATTEST:

DENISE D. ABRAMSEN  
Clerk of the Court

By: \_\_\_\_\_  
Chief Deputy Clerk